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Notes

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by
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Introduction

On March 24, 1993, the Senate Committee on Labor and Human Resources ordered the Freedom of Choice Act of 1993[1] (FOCA) favorably reported to the Senate.[2] The purpose of this bill is to codify

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1. S. 25, 103d Cong., 1st. Sess. (1993) [hereinafter FOCA]. For the complete text of FOCA, see Appendix following this Note *infra*.

2. 139 CONG. REC. D279 (daily ed. Mar. 24, 1993). The bill was originally introduced in 1989 as S. 1912, the Freedom of Choice Act of 1989. S. REP. No. 42, 103d Cong., 1st Sess. 3 (1993). It was re-introduced as S. 25 on January 14, 1991, but Senate Majority Leader George Mitchell, D-Me., expressed "serious reservations" about its constitutionality. *Talking Points*, WASH. POST, Feb. 4, 1992, at A13. Mitchell, a former United States District Court judge, raised questions about "whether 'fundamental constitutional rights' should be established by a majority vote in Congress," and called proposed congressional action on FOCA "'a very dangerous precedent' that would allow another Congress to repeal that right by simple majority." *Id.* (quoting Mitchell). The Senate Subcommittee on Labor and Human Resources held further hearings on May 13, 1992 to address these concerns. *Freedom of Choice Act of 1991: Hearing on S. 25 Before the Senate Comm. on Labor and Human Resources*, 102d Cong., 2d Sess. (1992) [hereinafter *Constitutionality Hearings*]. These hearings led to the current version of the bill, which was introduced on July 15, 1992, then re-introduced in the 103d Congress on January 21, 1993. 139 CONG. REC. S190 (daily ed. Jan. 21, 1993). The Senate Subcommittee on Labor and Human Resources ordered the bill favorably reported to the full Senate, 139 CONG. REC. D279, where it is currently pending. A similar bill is also pending in the House of Representatives. H.R. 25, 103d Cong., 1st Sess. (1993).

Three events last summer slowed the political momentum of FOCA. First, the House voted 255 to 178 to continue the ban on most Medicaid-funded abortions (the Hyde Amendment). *See* Adam Clymer, *Anti-Abortion Rally; Comeback Victory in Congress Sends a Warning to Pro-Choice Lawmakers*, N.Y. TIMES, July 3, 1993, at A6; J. Jennings Moss, *Fund Ban Erodes Hope for Abortion Bill*, WASH. TIMES, July 7, 1993, at A1. Second, Senator Carol Moseley-Braun, D-Ill., withdrew her support for FOCA because she believed it discriminates against poor women and minors. *See* Elaine S. Povich, *Abortion Rights Bill Rejected by Moseley-Braun*, CHI. TRIB., July 10, 1993, at 14; Robin Toner, *Mid-*

the Supreme Court's landmark holding in *Roe v. Wade*,[3] which prohibited states from regulating abortion without a "compelling state interest"[4] for doing so. In codifying this holding, FOCA would effectively overturn the Court's recent decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[5] While purporting to reaffirm *Roe*'s "central holding,"[6] the Court in *Casey* held that states may regulate abortion so long as state regulation does not impose an "undue burden" on a woman's ability to terminate her pregnancy.[7]

The power to regulate abortion has historically been reserved to the states under their police power.[8] The state power to regulate abortion has, of course, been restricted by the Due Process Clause of the Fourteenth Amendment when a regulation interferes with an individual's right to privacy.[9] However, state power in this area has never before been completely curtailed by federal legislation. Passage of FOCA would have far-reaching implications in the area of federal-state relations; its passage would further the trend away from the sys-

dle Ground on Abortion Shifting Into Terra Incognita, N.Y. TIMES, July 14, 1993, at A1. Third, on August 3, 1993, Justice Byron White, who had consistently voted against a constitutional right to abortion, was replaced by Justice Ruth Bader Ginsburg, who, during her Senate confirmation hearings, acknowledged her support for a woman's right to choose an abortion. *See* Sam Fulwood III, *Ginsburg Confirmed as Second Woman on Supreme Court*, L.A. TIMES, Aug. 4, 1993, at A1.

3. 410 U.S. 113 (1973).

4. *Id.* at 155. Although the bill explicitly states its purpose is to codify *Roe* and its progeny, FOCA § 2(b), some might challenge the actual restrictions imposed by the bill as going far beyond the holdings of these cases. *See Constitutionality Hearings*, *supra* note 2, at 20-21 (testimony of John C. Harrison, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice). This Note assumes that courts would construe FOCA as nothing more than a codification of *Roe* and its progeny prior to Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), in accordance with its stated purpose.

5. 112 S. Ct. 2791 (1992).

6. *Id.* at 2804.

7. *Id.* at 2820-21. "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 2821. The application of this standard would require upholding a substantial amount of state regulation that was invalid under *Roe*'s "compelling interest" standard. For example, in *Casey*, the Court upheld Pennsylvania's informed consent requirement and mandatory 24-hour waiting period, both of which were similar to other statutes that had previously been held unconstitutional under the *Roe* standard. *Id.* at 2826; *see* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983). For a detailed analysis of *Casey*'s undue burden standard, see Alan E. Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. (forthcoming April 1994).

8. In a sardonic reference to what he perceived as usurpment of this traditional state regulatory function, Senator Orrin Hatch called the identical 1992 version of the bill the "Washington Knows Best Act of 1992." *Constitutionality Hearings*, *supra* note 2, at 3.

9. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973).

tem of federalism envisioned by the framers of the Constitution and toward a powerful national government with wide-ranging powers.

This Note examines Congress's assertion that its power to regulate abortion comes from its "affirmative power both under section 8 of Article I of the Constitution . . . and under Section 5 of the Fourteenth Amendment of the Constitution to enact legislation to prohibit State interference with interstate commerce, liberty, or equal protection of the laws."[10] The problem with Congress's enacting FOCA under its power to regulate commerce is that the Commerce Clause[11] is a frail reed upon which to base such a broad and wide-ranging piece of social legislation that infringes so heavily upon state sovereignty. The courts would likely view Congress's attempt to base FOCA on its commerce power as an abridgement of the states' right to govern themselves, in violation of the Reserved Powers Clause of the Tenth Amendment.[12] Basing the legislation on Section 5 of the Fourteenth Amendment[13] would also present serious obstacles. Rather than enforcing the Fourteenth Amendment's Due Process Clause "by appropriate legislation," Congress would appear to be defining for itself the clause's meaning, without regard to the Supreme Court's interpretation of the clause. Congress's assumption of this role would raise grave separation-of-powers issues that could render FOCA unconstitutional.

Part I of this Note discusses whether Congress has the authority under the Commerce Clause to pass FOCA and concludes that even if it would otherwise fall within the commerce power, FOCA unconstitutionally encroaches on state sovereignty in violation of the Tenth Amendment. Part II addresses Congress's authority to enact FOCA under Section 5 of the Fourteenth Amendment, concluding that FOCA is a valid exercise of Congress's Section 5 power; the federalism principles that invalidate FOCA as an exercise of its power to regulate commerce do not apply with equal force when Congress exercises its Section 5 power.

10. FOCA § 2(a)(4).

11. Section 8 of Article I of the Constitution provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3.

12. *See infra* notes 28-95 and accompanying text.

13. Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

I. The Freedom of Choice Act as an Exercise of Congress's Commerce Power

A. The Scope of the Commerce Power

At first glance, Congress's assertion that it has the authority to base such a wide-ranging piece of social legislation on its power to regulate interstate commerce might seem absurd. During the last sixty years, however, Congress's commerce power has become so broad that it can support virtually any regulation as long as an argument can be made that the subject matter of the legislation touches upon interstate commerce. The extent of this power is best illustrated by the civil rights legislation of the 1960s.

In *Heart of Atlanta Motel, Inc. v. United States*,[14] the owner and operator of a 216-room downtown Atlanta motel brought a declaratory relief action attacking the constitutionality of Section 201 of the Civil Rights Act of 1964 (1964 Act).[15] The Supreme Court upheld the 1964 Act as a valid exercise of Congress's power under the Commerce Clause, despite the fact that the primary purpose of the act was to eliminate discrimination, not to foster commercial activity.[16]

The Court noted that the legislative history of the 1964 Act was "replete with evidence of the burdens that discrimination by race or color places upon interstate commerce."[17] For instance, "there was evidence that th[e] uncertainty [of the availability of lodging to a Negro traveler that] stem[s] from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community."[18] As long as an exercise by Congress of its Commerce Clause power removes impediments to interstate commerce, the fact

14. 379 U.S. 241 (1964).

15. Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (codified as amended at 42 U.S.C. § 2000a (1988 & Supp. V 1993)). Section 201(a) provides: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, . . . and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." Section 201(b) defines an establishment as "a place of public accommodation . . . if its operations affect commerce, or if discrimination or segregation by it is supported by State action." According to Section 201(b), "any inn, hotel, motel or other establishment which provides lodging to transient guests" is a place of public accommodation whose "operations . . . affect commerce," except when a live-in owner rents five rooms or fewer. As defined in Section 201(c), "commerce" includes all interstate and foreign commerce.

16. The 1964 Act's "purpose was 'to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations.'" *Heart of Atlanta Motel*, 379 U.S. at 245 (quoting H.R. Doc. No. 124, 88th Cong., 1st Sess. 14 (1963)).

17. *Id.* at 252. The interstate movement of people constitutes "commerce" that may be regulated under the Commerce Clause. *Id.* at 255-56.

18. *Id.* at 253.

that Congress also legislates against moral wrongs in the process does not make the exercise unconstitutional.[19]

Applying the 1964 Act to the facts of the case, the Court held that the discriminatory practices of the Heart of Atlanta Motel indeed affected interstate commerce. The motel advertised outside of Georgia using national advertising media, and was easily accessible by interstate highways. Approximately seventy-five percent of its registered guests were from out of state.[20] In response to the argument that operating a motel is of a purely local character, the Court noted, "[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[21]

In order to constitutionally exercise its commerce power, Congress only needs a rational basis for concluding that the regulated activity in some way affects interstate commerce.[22] The fact that the real purpose of particular legislation is to correct some social problem, and not to foster interstate commerce, is irrelevant. Under this standard, FOCA is a valid exercise of Congress's commerce power.

Because Congress could rationally conclude that disparate state regulation of abortion would affect interstate commerce, FOCA meets the extremely deferential Commerce Clause standard established in *Heart of Atlanta Motel.* In Section 2(a)(2), FOCA explicitly states Congress's findings that the diverse state regulations that have arisen in the wake of *Webster v. Reproductive Health Services*[23] operate cumulatively to

19. *Id.* at 257 (citing many other cases in which congressional activity directed against moral wrongs was nevertheless upheld under the Commerce Clause, including The Lottery Case, 188 U.S. 321 (1903) (gambling); Brooks v. United States, 267 U.S. 432 (1925) (criminal enterprises); Federal Trade Comm'n v. Mandel Bros., Inc., 359 U.S. 385 (1959) (deceptive practices in the sale of products); Securities & Exchange Comm'n v. Ralston Purina Co., 346 U.S. 119 (1953) (fraudulent security transactions); Weeks v. United States, 245 U.S. 618 (1918) (misbranding of drugs); United States v. Darby, 312 U.S. 100 (1941) (wages and hours); United States v. Baltimore & O.R.R., 333 U.S. 169 (1948) (discrimination against shippers); Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954) (protection of small business from injurious price cutting); and Boynton v. Virginia, 364 U.S. 454 (1960) (racial discrimination by owners and managers of transit terminal restaurants)).

20. *Id.* at 243.

21. *Id.* at 258 (quoting United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949)). In Katzenbach v. McClung, 379 U.S. 294 (1964), the companion case to *Heart of Atlanta Motel*, the Court again upheld the application of Section 201 of the 1964 Act to a local business—this time to Ollie's Barbecue, a Birmingham, Alabama restaurant located 11 blocks from an interstate highway.

22. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) ("The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding."); *Heart of Atlanta Motel*, 379 U.S. at 258; *McClung*, 379 U.S. at 303-04.

23. 492 U.S. 490 (1989).

> burden interstate commerce by forcing women to travel from States in which legal barriers render contraception or abortion unavailable or unsafe to other states or foreign nations; . . . burden the medical and economic resources of States that continue to provide women with access to safe and legal abortion; and . . . obstruct access to and use of contraceptives and other medical techniques that are part of interstate and international commerce.[24]

These findings are supported by testimony from numerous medical experts,[25] as well as by the amicus brief to the Supreme Court filed in *Webster* by the attorneys general of California, Colorado, Massachusetts, New York, Texas, and Vermont.[26] Therefore, applying *Heart of Atlanta Motel*'s deferential standard of review, FOCA lies within Congress's commerce power.[27]

B. Because FOCA Unduly Encroaches on State Sovereignty, It Is an Unconstitutional Exercise of Congress's Commerce Power

The text of the Tenth Amendment has been described as "essentially a tautology."[28] This description results from the language of the

24. FOCA § 2(a)(2)(A)(ii), (iv), (B).

25. *See Freedom of Choice Act of 1989: Hearings on S. 1912 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 68 (1990).

26. Brief for Amicus Curiae at 16-17, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605). "An extraordinary burden will fall upon the states that continue to provide women with the right to choose to terminate their pregnancies. Such states can anticipate an influx of non-residents seeking the abortion or related medical services prohibited in their home states. . . . This will strain already overburdened health care systems." *Id.*

27. John C. Harrison, who testified before the Senate Committee on Labor and Human Resources on behalf of the Justice Department against the constitutionality of FOCA, conceded that "the Supreme Court has interpreted the Commerce Clause so as to give Congress broad power, and that some form of legislation . . . concerning abortion could be grounded in that power." *Constitutionality Hearings*, *supra* note 2, at 11. Harrison goes on to say, however, that in the Bush administration's view, FOCA "is not an appropriate exercise of the commerce power." *Id.*

This argument is rather disingenuous, for surely Harrison would agree that under the deferential standard of review that is applied when reviewing Congress's exercise of its Commerce Clause power, the opinion of the executive branch concerning the wisdom or appropriateness of particular legislation is just as irrelevant as the opinion of the judiciary. The only relevant issue is whether Congress can have a "rational basis for finding a chosen regulatory scheme necessary to the protection of [interstate] commerce." *McClung*, 379 U.S. at 304.

There is, however, one important fact that distinguishes FOCA from the legislation at issue in *Heart of Atlanta Motel* and its progeny, and perhaps justifies Harrison's comment: FOCA is directed solely at the states, rather than at individuals. The significance of this factor is explored in Subpart B, *infra*.

28. New York v. United States, 112 S. Ct. 2408, 2418 (1992). The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

amendment, which merely reserves *to* the states that which has not been taken *from* the states.[29] However, the Tenth Amendment is more than a restatement of the obvious. It is an expression of the tacit constitutional scheme under which "the States retain substantial sovereign powers . . . with which Congress does not readily interfere."[30] Thus, although FOCA may otherwise lie within Congress's commerce power, the Tenth Amendment would still render FOCA unconstitutional if it "oversteps the boundary between federal and state authority."[31]

The notion that an otherwise valid exercise of the commerce power would be unconstitutional if it unduly encroached upon state sovereignty was advanced in the 1976 case of *National League of Cities v. Usery*.[32] The issue in *National League of Cities* was the constitutionality of a 1974 congressional amendment extending the Fair Labor Standards Act (FLSA), which set minimum wage and maximum hours constraints, to cover all state employees.[33] The Supreme Court, expressly overruling an eight-year-old precedent,[34] held the statute unconstitutional because it "directly displace[d] the States' freedom to structure integral operations in areas of traditional government functions."[35] The Court explained that it "has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce."[36]

29. *See id.*; United States v. Oregon, 366 U.S. 643, 649 (1961); Case v. Bowles, 327 U.S. 92, 102 (1946); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 (1941).

30. Gregory v. Ashcroft, 111 S. Ct. 2395, 2401 (1991); *see also New York*, 112 S. Ct. at 2425 (collecting cases); Tafflin v. Levitt, 493 U.S. 455, 458 (1990) (stating that "the States possess sovereignty concurrent with that of the Federal Government"); Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926) (stating that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers"); Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869) (stating that "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government").

31. *New York*, 112 S. Ct. at 2419.

32. 426 U.S. 833 (1976).

33. *Id.* at 836.

34. Maryland v. Wirtz, 392 U.S. 183, 196-97 (1968) (upholding the extension of FLSA to cover certain public employees, including those at state hospitals, institutions, and schools).

35. *National League of Cities*, 426 U.S. at 852. Justice Rehnquist wrote the opinion of the Court, in which Chief Justice Burger and Justices Powell and Stewart joined. Justice Blackmun also joined the Court's opinion, but indicated that he was "not untroubled by certain possible implications of the Court's opinion." *Id.* at 856 (Blackmun, J., concurring). Justices Brennan, White, Marshall, and Stevens dissented.

36. *Id.* at 842-44 (citing Fry v. United States, 421 U.S. 542, 547 n.7 (1975) ("The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function

All federal regulation, however, encroaches on state sovereignty to some degree. The task of the courts after *National League of Cities* thus became one of distinguishing between valid federal legislation and legislation so repugnant to principles of federalism that it was unconstitutional. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[37] the Court attempted to tackle this problem.

In *Hodel*, the Court enunciated four conditions that must be satisfied before the *National League of Cities* principle could be applied to strike down an exercise of Congress's commerce power. First, the federal statute at issue must regulate "the 'States as States.'"[38] Second, the federal statute must "address matters that are indisputably 'attribute[s] of state sovereignty.'"[39] Third, state compliance with the federal law had to "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'"[40] Fourth, the relation of state and federal interests could not be such that "the nature of the federal interest . . . justifies state submission."[41]

This four-part test proved to be unmanageable. The third part of the test, which distinguished between "traditional" and "nontraditional" government functions, was particularly problematic.[42] Of the four cases attempting to apply the *National League of Cities* principle,

effectively in a federal system."); New York v. United States, 326 U.S. 572, 587-88 (1946) (plurality opinion) (rejecting the proposition that Congress could impose taxes on the states so long as it did so in a nondiscriminatory manner); Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869); Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869)).

37. 452 U.S. 264 (1981).

38. *Id.* at 287 (quoting *National League of Cities*, 426 U.S. at 854).

39. *Id.* at 287-88 (quoting *National League of Cities*, 426 U.S. at 845).

40. *Id.* at 288 (quoting *National League of Cities*, 426 U.S. at 852).

41. *Id.* at 288 n.29. The federal legislation at stake in *Hodel* involved regulation of surface mining that had the effect of displacing state regulation except when the state adopted the federal regulation. Applying its newly formulated four-part test to the facts of the case, the Court unanimously upheld the federal legislation, holding that the first condition was not met because the regulation was not "directed to the States as States." *Id.* at 288.

42. As one commentator noted:

> "Traditional" might be synonymous with "customary" as of some particular date, *e.g.*, 1791, when the Bill of Rights was adopted. Alternatively, "traditional" might be synonymous with "conservative," *i.e.*, with minimalist theories of proper governmental functions: to provide laws mediating claims of private right, a police force to maintain order, and a court system for adjudications, and no more. Under either view, if a state undertook something new in the provision of public service, . . . it would have to yield to Congress the power to determine the terms. Either way of drawing the line would pose problems for several Justices who would understandably resist a notion that the Constitution embeds some bright line conservative principle respecting the "proper" role of state government.

William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1716-17 (1985).

not one invalidated a federal regulation.[43] In the fifth case, *Garcia v. San Antonio Metropolitan Transit Authority*,[44] the Court abandoned the *National League of Cities* doctrine altogether.[45]

In *Garcia*, the Court emphasized the difficulty in applying the third part of the *National League of Cities* test, stating that none "of the alternative standards that might be employed to distinguish between protected and unprotected governmental functions appear manageable."[46] The problem, according to the Court, was that "[a]ny rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[47]

In discarding the *National League of Cities* principle, the Court reasoned that the sovereignty of the states is better protected by "the structure of the Federal Government itself" than by judicial review.[48] Since the states have significant influence in the Senate through equal representation regardless of population, as well as influence over the Presidency through their control of electoral qualifications, the Court was convinced that state sovereignty would be preserved even without the participation of the federal judiciary.[49]

Thus, after *Garcia*, it appeared as though the Court would no longer get involved in issues of federalism, having essentially abdicated the field.[50] However, as the *Garcia* dissenters had promised,[51] the Court returned to this issue just seven years later in *New York v. United States*.[52]

New York concerned the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (the Radioactive Waste Act).[53] Faced with a major shortage of disposal sites for low-

43. *Hodel*, 452 U.S. at 276-77 (unanimously upholding federal regulation); United Transp. Union v. Long Island R.R., 455 U.S. 678, 682 (1982) (same); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 745 (1982) (Justice Blackmun joining the *National League of Cities* dissenters to rule five to four in favor of the federal legislation); Equal Employment Opportunities Comm'n v. Wyoming, 460 U.S. 226, 229 (1983) (same).

44. 469 U.S. 528 (1985).

45. *Id.* at 531.

46. *Id.* at 543.

47. *Id.* at 546.

48. *Id.* at 550.

49. *Id.* at 550-54.

50. Van Alstyne, *supra* note 42, at 1723.

51. *See Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting) ("[The *National League of Cities*] principle . . . will, I am confident, in time again command the support of a majority of this Court."); *see also id.* at 589 (O'Connor, J., dissenting) ("I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility.").

52. 112 S. Ct. 2408 (1992).

53. *Id.* at 2414.

level radioactive waste,[54] Congress enacted what amounted to a compromise between states that had disposal sites and states that did not.[55] One of the provisions of the Radioactive Waste Act, the "take title" provision, provided:

> If a State . . . in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State [either by itself or in cooperation with other States] . . . by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste . . . and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste . . . .[56]

In a declaratory relief action, the Supreme Court held this take title provision unconstitutional because it was "inconsistent with the federal structure of our Government established by the Constitution."[57] Writing for the Court, Justice O'Connor distinguished *National League of Cities* and *Garcia*, stating that those cases "concerned the authority of Congress to subject state governments to generally applicable laws."[58] In contrast, through the take title provision at issue in *New York*, Congress was attempting to force the states to regulate in a particular way.[59] Thus the Court considered itself free to analyze, without regard to the *Garcia* holding, whether a federal statute that "offers a state government no option other than that of implementing legislation enacted by Congress" violates the Tenth Amendment.[60]

The Court began with the proposition that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[61] According to the Court, the Framers had envisioned a national government that could act directly upon the individual by regulating or prohibiting certain acts, but could not act indirectly by forcing states to regulate or prohibit those acts.[62] Congress can encourage or entice a state to act in a particular way—for example, by attaching conditions to the receipt of federal funds,[63] or, when Congress has the authority to regulate private activity, by threatening to

54. Only three states—Nevada, South Carolina, and Washington—had disposal sites. *Id.*

55. *Id.* at 2415.

56. *Id.* at 2416 (quoting 42 U.S.C. § 2021e(d)(2)(C) (Supp. V 1993)).

57. *Id.* at 2429.

58. *Id.* at 2420.

59. *Id.*

60. *Id.* at 2429.

61. *Id.* at 2420 (quoting *Hodel*, 452 U.S. at 288 (alteration in original)).

62. *Id.* at 2421-23.

63. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 206 (1987).

preempt state law with federal regulation.[64] However, Congress may not compel a state to act in a particular way through outright coercion.[65]

The Court asserted that the prudential benefits of federalism were irrelevant to its analysis, because its task consisted "not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution."[66] Despite this assertion, the Court proceeded to describe the benefits of the constitutional structure that prohibits Congress from compelling the states to regulate in a particular way:

> Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.
>
> By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished .... [I]f the decision turns out to be detrimental or unpopular[,] ... it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.[67]

Applying these principles to the take title provision, the Court stated, "The take title provision offers state governments a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress."[68] Forcing the states to undertake either of these options individually would be to "commandeer" state governments for federal regulatory purposes.[69] Because "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all," the Court held that the take title provision was an unconstitutional exercise of Congress's commerce power.[70]

FOCA, like the take title provision of the Radioactive Waste Act, is directed at the states, not at private individuals. Therefore, FOCA is arguably distinguishable from the statutes at issue in *National League of Cities* and *Garcia*. However, FOCA is also distinguishable from the statute at issue in *New York*. While the take title provision commanded the states to enact legislation, FOCA prevents the states from acting. Therefore, to determine whether FOCA is a valid exercise of Congress's commerce power, these distinctions must be analyzed and applied to the unique circumstances presented by FOCA.

64. *See, e.g., Hodel*, 452 U.S. at 288.
65. *New York*, 112 S. Ct. at 2424.
66. *Id.* at 2418.
67. *Id.* at 2424.
68. *Id.* at 2428.
69. *Id.*
70. *Id.*

Political accountability is not undermined when Congress prevents the states from regulating. The *New York* Court rationalized its holding by arguing that if Congress were allowed to command the states to regulate, the political accountability of both federal and state officials would be diminished. This rationale does not apply with equal force in the case of FOCA because, in passing FOCA, Congress is not hiding from the full view of the public behind the cloak of state regulation. If FOCA turns out to be detrimental or unpopular, the only actor at which the public would be able to point a finger would be Congress; the states would not have acted at all. Unlike the take title provision, passing FOCA does not insulate Congress from political fallout caused by coercing the states to act. In fact, quite the opposite would be the case. By essentially preempting the field of abortion regulation, Congress's enactment of FOCA would lift the political responsibility for regulating abortion off the shoulders of state officials and place it onto its own.

However, the distinction between the take title provision at issue in *New York*, by which Congress forced the states to act in a particular way, and FOCA, by which Congress would prevent the states from acting in a particular way, is largely formalistic. Although it would not commandeer the state legislatures to further its aims through FOCA, Congress would compel the states to take a particular course of inaction. It is difficult to see how this would be looked on any more favorably than the take title provision by those who wish to preserve the delicate balance of the regulatory power of government between the states and Congress. According to the *New York* Court, "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions."[71] Because it directly instructs the states, FOCA would appear to fall within *New York*'s holding.

However, *New York* appears to have left undisturbed the holding in *Garcia*—that state sovereignty is better protected by "the structure of the Federal government itself" than by the courts. The *New York* Court distinguished *Garcia* based on the fact that *Garcia* concerned the ability of Congress to subject the states to generally applicable laws, as opposed to laws directed solely at the states. The *New York* dissenters severely criticized this distinction, stating:

> [O]ne would be hard-pressed to read the spirited exchanges between the Court and dissenting Justices in *National League of Cities* . . . and in *Garcia* . . . as having been based on the distinction now drawn by the Court. An incursion on state sovereignty hardly

71. *Id.* at 2421.

> seems more constitutionally acceptable if the federal statute that "commands" specific action also applies to private parties.[72]

Regardless of the validity of this distinction drawn by the *New York* Court, does it apply in the case of FOCA?

Although its commands are directed at the states, the goal of FOCA is to create a statutory right for individuals—the right of a woman to choose to terminate her pregnancy. It is different from the statute at issue in *Garcia* in that FOCA does not regulate private activity to the same extent as state activity. However, it is also different from the take title provision in *New York* in that FOCA seeks not to compel state action, but instead to preempt state law in the area of abortion. Thus, it is difficult to see how the principles underlying *Garcia* would not apply in a constitutional challenge to FOCA.

Even if FOCA is covered by *Garcia*, however, the holding in *Garcia* should either be narrowed to exclude the situation presented in FOCA, or overturned completely. The factor that led the *Garcia* Court to overturn *National League of Cities* was the difficulty the Court experienced in drawing the line between protected and unprotected state functions.[73] However, in neither the case of FOCA nor the take title provision at issue in *New York* would such a determination present a problem. In both cases, the federal statute is directed at the states' legislative functions, which under any standard would be "protected" functions. Although *Garcia*'s criticism of the test in *National League of Cities* and *Hodel* may have been valid,[74] the *Garcia* majority never adequately refuted the constitutional principles behind the test.[75] As evidenced by the holding of the Court in *New York*, while *National League of Cities* itself may have been overruled, the principles behind that case remain sound,[76] and should be invoked to invalidate FOCA as an unconstitutional exercise of Congress's commerce power.

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72. *Id.* at 2441 (White, J., joined by Blackmun and Stevens, JJ., dissenting).

73. *See supra* note 46 and accompanying text.

74. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-22, at 389-93 (2d ed. 1988).

75. Professor Van Alstyne has argued that because the test was poorly formulated, the principles behind *National League of Cities* were subject to "premature and unwarranted hostility." Van Alstyne, *supra* note 42, at 1717. He criticizes the *Garcia* court, arguing:

> Several Justices, respectfully, did not try to make it work. Rather, those Justices originally in dissent from Justice Rehnquist's analysis failed to treat it in the manner the Court has otherwise wisely tended to do in equivalent circumstances associated with great cases: not as the final word on the subject, but as the first words.

Id. (citing New York Times v. Sullivan, 376 U.S. 254 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954); Schenck v. United States, 249 U.S. 47 (1919); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851)).

76. *See* TRIBE, *supra* note 74, § 5-22, at 388 ("The concerns that underlay *National League of Cities*, then, were real ones. The political safeguards of federalism cannot always be counted on to prevent abuses of federal legislative power.").

The holding in *Garcia* was based on the notion that the judiciary should defer completely to the political process when considering issues of federalism because the political process is better able to balance concerns of the states against concerns of the nation.[77] This conception of the role of the judiciary in federalism was developed by Professor Jesse Choper,[78] and stands in stark contrast to the traditional role of the Court with respect to issues of individual liberties.

Professor Choper has argued, "A primary justification for judicial review of claimed infringements of individual liberty is the teaching of theory and experience that these constitutionally secured interests are unlikely to receive sympathetic consideration in the political process."[79] The same cannot be said for federalism questions[80] because the states enjoy adequate representation in the Senate and, through the electoral college and the presidential nominating process, over the Presidency.[81] According to Choper, history has taught that due to this power of the states over the national government, "the proliferation of national programs has neither led to a centralized autocracy nor resulted in the concentration of federal power to the exclusion of the individual states."[82] Therefore, because the political process is adequate to protect states' rights, the Court should avoid "needless adjudication of . . . [this] troublesome category of constitutional issues," and save its strength to instead address issues of individual liberty.[83] The Court relied heavily on this argument in *Garcia.*

This reasoning suffers from the following flaw: "The fact that Congress generally does not transgress constitutional limits on its power to reach state activities does not make judicial review any less necessary to rectify the cases in which it does do so."[84] If Congress oversteps its bounds with respect to the states, the Court has a duty to see that the "federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful."[85]

Professor Choper counters by arguing that if a situation arises in which Congress and the President join to greatly infringe upon states'

77. *See Garcia*, 469 U.S. at 556; *supra* notes 48-49 and accompanying text.

78. Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensibility of Judicial Review*, 86 YALE L.J. 1552 (1977).

79. *Id.* at 1560 (citing Jesse H. Choper, *On the Warren Court and Judicial Review*, 17 CATH. U. L. REV. 20, 40-41 (1967)).

80. *Id.*

81. *Id.* at 1561-64.

82. *Id.* at 1568.

83. *Id.* at 1579.

84. *Garcia*, 469 U.S. at 566-67 (Powell, J., dissenting).

85. *Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting); *see also* Van Alstyne, *supra* note 42, at 1724 ("Stripped of its elegance, *Garcia* proposes the piecemeal repeal of judicial review.").

rights, "it is probably futile to rely on the Court to right the matter."[86] However, this is not a sufficient justification for the complete abdication of judicial responsibility to interpret and uphold the Constitution.[87]

Professor William Van Alstyne has suggested an alternative to *National League of Cities*' "traditional-nontraditional" distinction when trying to determine the extent that congressional legislation may infringe on state sovereignty.[88] Rather than creating an unjustifiable distinction between "traditional" and "nontraditional" functions, Van Alstyne suggests that all functions the state or local government finds consistent with the public welfare and unsuitable to leave to the private sector ought to be provided equal Tenth Amendment protection.[89] If Congress is going to interfere with these functions, he argues, it should have to justify "its authority with a judicially acceptable reason in every such case, and not simply in those involving 'traditional' public services as previously defined."[90] This justification would have to relate "to the imperatives of things otherwise within the power of Congress to command."[91] Under this view, the reason Congress gives to justify an encroachment on state functions when exercising its commerce power would have to relate to commerce.[92]

Under Van Alstyne's test, FOCA clearly violates the Tenth Amendment. The state activity regulated by FOCA cannot be considered commercial in any sense. Although Congress could rationally conclude that disparate state regulations affect commerce, it could not claim that this commercial effect is sufficient to justify such a substantial encroachment on the states' authority to enact social legislation under their police power. To justify its command to the states, Congress would have to rely on its own interest in protecting the health and welfare of women. Since these reasons are unrelated to commerce, they should not be used to override states' equal interests in protecting the health and welfare of their citizens.

86. Choper, *supra* note 78, at 1606.

87. *See Garcia*, 469 U.S. at 567 (Powell, J., dissenting) (stating that the *Garcia* majority ignored the teaching of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is" with respect to the constitutionality of acts of Congress).

88. Van Alstyne, *supra* note 42, at 1717-19.

89. *Id.* at 1719-20.

90. *Id.* at 1718.

91. *Id.*

92. *Id.* at 1718 n.40 ("Under this view, the more the state's own commercial practices (*e.g.*, making cars for sale at market prices to compete with G.M. or Ford) mingle in national commercial markets, the greater its subordination to such rules of trade as Congress may otherwise see fit to impose upon that trade."). Professor Van Alstyne's approach is similar to the "balancing approach" suggested by Justice Blackmun's concurring opinion in *National League of Cities*, 426 U.S. at 856.

For those who approve of the intended result of FOCA, it is tempting to sacrifice the structural principles of federalism in favor of the concrete individual freedoms FOCA would provide. However, as Justice O'Connor has written, "The Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[93]

Freedom of choice advocates should not be so willing to relinquish the protections of federalism and allow Congress to regulate abortion through its commerce power. If Congress has the power to regulate abortion under its commerce power it could just as easily restrict abortions at the national level. Any law that was uniform would be a valid exercise of Congress's commerce power as long as it did not violate *Casey*'s "undue burden" test. For instance, under its commerce power, Congress could pass a national informed consent requirement or a twenty-four hour waiting period.[94] One's position on the abortion issue should not cloud the serious federalism concerns at stake. National abortion regulation through Congress's commerce power is an illegitimate restriction on the ability of the states to resolve the issue for themselves.[95]

II. The Freedom of Choice Act as an Exercise of Congress's Section 5 Power

In addition to its Commerce Clause power, Congress asserts the authority to pass FOCA under Section 5 of the Fourteenth Amendment.[96] In accordance with Section 5, FOCA purports to enforce the due process and equal protection guarantees of Section 1 of the Four-

93. *New York*, 112 S. Ct. at 2434.

94. *See* Planned Parenthood v. Casey, 112 S. Ct. 2721, 2822-26 (1992).

95. Professor Tribe, who testified that FOCA was a valid exercise of Congress's commerce power at the May 1992 hearings, testified before the Senate on the abortion issue in 1981: "If these matters are divisive, if they are unclear, why try to resolve them nationally? Why not decentralize?" *Constitutionality Hearings*, *supra* note 2, at 15 (citing *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 245 (1981)). Although FOCA would impose the same restriction on the states' ability to resolve the abortion issue for themselves regardless of whether it was based on Section 5 of the Fourteenth Amendment or the Commerce Clause, such a restriction based on Section 5 is legitimate because of the unique responsibility given Congress by the states to enforce the Fourteenth Amendment. *See infra* notes 98-100 and accompanying text.

96. FOCA § 2(a)(4). Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

teenth Amendment.[97] If FOCA is a valid exercise of Congress's Section 5 power, it would overcome the Tenth Amendment-based infirmities that render it an invalid exercise of Congress's Article I commerce power.

Because of the unique responsibility given to Congress under Section 5 of the Fourteenth Amendment, principles of state sovereignty do not limit the exercise of the powers created by that provision.[98] "[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the [Fourteenth Amendment] 'by appropriate legislation.'"[99] Therefore, "Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers."[100] Consequently, the fact that the Tenth Amendment invalidates FOCA as an exercise of Congress's commerce power does not preclude FOCA from being a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment.

This conclusion is logically sound for two reasons. First, the states ratified the Fourteenth Amendment after the Tenth. In so doing, the states explicitly gave up their sovereignty to the extent necessary for Congress to enforce the provisions of the later amendment. Second, as detailed in this Part, Congress's Section 5 power may only be invoked to enhance[101] and enforce the specific individual liberties of the Fourteenth Amendment. This is in contrast to its commerce power, which, if left unchecked, may extend into virtually every area of individual and governmental activity. Therefore, although Congress may substantially intrude upon state sovereignty under Section 5, it may only do so in the narrowly defined area of Fourteenth Amendment liberties.

97. FOCA § 2(a)(4). Section 1 of the Fourteenth Amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

98. *Ex parte* Virginia, 100 U.S. 339, 346 (1879).

99. City of Rome v. United States, 446 U.S. 156, 179 (1980) (holding that Congress may provide for private suits to enforce the provisions of the Fourteenth Amendment); *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("Congress may[,] . . . for purposes of enforcing . . . the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." (citations omitted)).

100. EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (citing *City of Rome*, 446 U.S. at 179).

101. Under the "ratchet theory" of Congress's Section 5 power, Congress may only enlarge the individual liberties of the Fourteenth Amendment, and may not limit them. *See infra* note 117 and accompanying text.

A. *Katzenbach v. Morgan*

The leading case on the scope of Congress's Section 5 power is *Katzenbach v. Morgan*.[102] In *Morgan*, registered voters in New York City brought suit challenging the constitutionality of Section 4(e) of the Voting Rights Act of 1965.[103] Section 4(e) provided that no person who had successfully completed the sixth grade in an accredited Spanish-speaking school in Puerto Rico could be denied the right to vote in any election because of an inability to read or write English. This statute effectively invalidated literacy requirements enacted by the New York legislature. The voters argued that the statute could not be justified as a measure enforcing the Equal Protection Clause of the Amendment unless the Court determined that New York's literacy requirement itself violated the Equal Protection Clause.[104] However, seven years prior to *Morgan*, the Court had upheld just such a literacy requirement against an equal protection challenge.[105] Therefore, according to the voters, the Voters Rights Act of 1965 could not be sustained as an appropriate exercise of Congress's Section 5 power.

The Supreme Court disagreed, holding that Section 5 gave Congress a much more expansive power than that envisioned by the New York voters. "By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause."[106] Therefore, determining what constitutes "appropriate legislation" under Section 5 entails referring to the standard under the Necessary and Proper Clause, as set forth by Chief Justice John Marshall in *McCulloch v. Maryland*.[107] Section 5 can thus be seen as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[108]

Having determined the scope of Congress's power, the Court proceeded to present two different rationales for its conclusion that Section 4(e) of the 1965 Voting Rights Act met the *McCulloch* standard of "appropriate legislation." First, Congress could have reasonably concluded that by giving Spanish-speaking Puerto Ricans the right to vote, it was securing for the entire Puerto Rican community

102. 384 U.S. 641 (1966).
103. 42 U.S.C. § 1973(b)(e)(1), (2) (Supp. V 1993).
104. *Morgan*, 384 U.S. at 648.
105. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51-53 (1959).
106. *Morgan*, 384 U.S. at 650; *see* U.S. CONST. art. I, § 8, cl. 18.
107. *Morgan*, 384 U.S. at 650-51; *see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").
108. *Morgan*, 384 U.S. at 651.

the ability to prevent discrimination in the provision of services such as public schools, public housing, and law enforcement.[109] This rationale, which is consistent with earlier Court decisions,[110] merely recognizes that Congress may pass a prophylactic law aimed at prohibiting a judicially determined Fourteenth Amendment violation.[111]

The second rationale provided by the Court was that Congress could have reasonably concluded that New York's English literacy requirement itself, as applied to persons with a sixth grade education in Spanish-speaking Puerto Rican schools, violated the Equal Protection Clause, notwithstanding the Court's contrary holding in *Lassiter v. Northampton County Board of Elections*.[112] This second rationale is controversial[113] because it implies that, contrary to the holding of *Marbury v. Madison*, Congress may interpret for itself provisions of the Constitution.[114] Furthermore, besides "[standing] *Marbury v. Madison* on its head by judicial deference to congressional interpretation of the Constitution,"[115] a second problem exists with this rationale: If Congress is given discretion to determine for itself the substance of the Fourteenth Amendment, there is no logical reason why Congress could not use "its § 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of th[e] Court."[116]

Justice Brennan's majority opinion in *Morgan* addresses this latter argument by proposing a so-called "ratchet theory" of Congress's Section 5 power: "Congress's power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[117] However, as Professor Laurence Tribe has pointed out, Justice Brennan "did not fully explain . . . *why* congressional power was so limited; nor did [he] attempt to reconcile with the principle of judicial review even a one-way power authoritatively to construe the Constitution."[118]

109. *Id.* at 652-53.

110. *E.g.*, South Carolina v. Katzenbach, 384 U.S. 641, 650-51 (1966) (applying the *McCulloch* standard to uphold the Voting Rights Act under the Fifteenth Amendment, which has an enforcement clause identical to that of the Fourteenth Amendment).

111. *See* TRIBE, *supra* note 74, § 5-14, at 341.

112. *Morgan*, 384 U.S. at 653-56.

113. *See infra* commentaries collected in note 119.

114. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 143 (1803) ("[I]t is the province and duty of the judicial department to say what the law is.").

115. William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975); *see also* TRIBE, *supra* note 74, § 5-14, at 342.

116. *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting).

117. *Id.* at 651 n.10.

118. TRIBE, *supra* note 74, § 5-14, at 343.

Legal commentators have attempted to provide a justification for *Morgan*'s second rationale, to defend Justice Brennan's "ratchet theory," and to propose objective limits on Congress's *Morgan* power.[119] All of their attempts fall short for one reason or another.[120] This inability, combined with critical Supreme Court commentary on the subject,[121] lead to the conclusion that the validity of *Morgan*'s second rationale is in doubt.

B. FOCA Is Constitutional Under *Morgan*

Fortunately, a resolution of the controversy surrounding *Morgan*'s second rationale is not necessary for a determination of the validity of FOCA,[122] because FOCA is a valid exercise of Congress's Section 5 power under the first *Morgan* rationale. FOCA can be seen

119. *See, e.g.*, Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1970) ("fact-finding theory"); Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106-08 (1966) (same); Cohen, *supra* note 115 ("liberty-federalism theory"); Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life Legislation,"* 68 VA. L. REV. 333, 429-33 (1982) ("statutory rights theory"); Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81 ("norm elaborator theory"); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (same); *see also* TRIBE, *supra* note 74, § 5-14, at 266-71 (discussing generally all the theories, and adopting the "statutory rights theory").

120. *See* TRIBE, *supra* note 74, § 5-14, at 270-71 (criticizing all but the "statutory rights theory"). For further criticism of the "factfinding theory," see Burt, *supra* note 119, at 105-06; Cohen, *supra* note 119, at 612-13; Estreicher, *supra* note 119, at 425-26; Sager, *supra* note 119, at 1232-35. For further criticism of the "norm elaborator theory," see Estreicher, *supra* note 119, at 427-29. The only theory that has not been subject to heavy criticism has been the "statutory rights theory" embraced by Estreicher and Tribe. *See supra* note 119. However, this theory begs the question of what limits on congressional authority Section 5 places, and how the phrase "enforce, by appropriate legislation, the provisions of this article" should be interpreted.

121. In dissent in EEOC v. Wyoming, 460 U.S. 226 (1983), Chief Justice Burger, joined by Justices Rehnquist, Powell, and O'Connor, indicated disapproval with this second *Morgan* rationale, stating:

> Allowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government. Although the *South Carolina v. Katzenbach* line of cases may be read to allow Congress a degree of flexibility in deciding what the Fourteenth Amendment safeguards, I have always read *Oregon v. Mitchell* as finally imposing a limitation on the extent to which Congress may substitute its own judgment for that of the states and assume this Court's "role of final arbiter."

Id. at 262 (Burger, C.J., dissenting) (quoting Oregon v. Mitchell, 400 U.S. 112, 205 (1970) (Harlan, J., concurring in part and dissenting in part)).

122. The Senate Report accompanying FOCA indicates that Congress may actually be attempting to base its authority under the second line of reasoning in *Morgan* by finding that state regulations which are invalid under *Roe v. Wade*'s strict scrutiny standard, but not invalid under *Casey*'s undue burden test, violate the due process and equal protection guarantees of the Fourteenth Amendment:

as a preventative law, aimed at states that pass laws which, though constitutional themselves, may result in Fourteenth Amendment violations through their cumulative operation.

Congress has reasonably determined that state regulations which violate *Roe*'s "compelling state interest" test, but pass *Casey*'s "undue burden" test, would prevent certain women from obtaining safe, legal abortions. Because of this "forced pregnancy," Congress has determined that some women will face impermissible gender discrimination.[123] As the plurality recognized in *Casey*, "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[124] Furthermore, Congress has reasonably concluded that "state and local restrictions on the ability of women to obtain legal abortions would also result in discrimination against low-income women, a disproportionate number of whom are members of racial or ethnic minorities,"[125] and that "restrictions by individual States on the right of women to obtain safe and legal abortions would have profound implications for freedom of travel."[126]

Because it can be based on these findings, FOCA presents no separation-of-powers problems. Analogous to the first *Morgan* rationale, Congress is not interpreting for itself the provisions of the Fourteenth Amendment. Instead, it is using its "specially informed legislative competence"[127] to determine that certain state regulations, although not unconstitutional in themselves, will result through their enforcement in the deprivation of individual rights guaranteed by the Fourteenth Amendment.[128] Therefore, FOCA is a valid exercise of

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> It is the Committee's view, based on evidence presented to Congress and discussed herein, that any restriction of a woman's right to terminate a pregnancy which would have been invalidated under the strict scrutiny standard of *Roe* will make it significantly harder to exercise the very "liberty" that a majority of the Court in *Casey* recognized was involved and will in fact constitute an impermissible burden on this liberty, particularly when considered in cumulation with the other, similar restrictions of which Congress, as a legislature, may take notice in a manner impossible for a federal court reviewing the record in an individual case.

S. REP. NO. 321, 102d Cong., 2d Sess. 28 (1992).

123. *See id.* at 29 (maintaining that state restrictions on abortion "affect constitutional guarantees of gender equality").

124. Planned Parenthood v. Casey, 112 S. Ct. 2721, 2809 (1992) (citing ROSALIND P. PETCHESKY, ABORTION AND WOMAN'S CHOICE 109, 133 n.7 (rev. ed. 1990)).

125. S. REP. NO. 321 at 29.

126. *Id.*

127. *Morgan*, 384 U.S. at 656.

128. Specifically, Congress has concluded the state regulations "would directly advance the Fourteenth Amendment guarantees of 'liberty,' 'equal protection of the laws,' 'due process,' the 'right to travel' and enjoyment of the privileges or immunities of national citizenship." S. REP. NO. 321 at 30.

Congress's Section 5 power under the well-settled first rationale of *Morgan*.[129]

Conclusion

Congress has constitutional authority to pass FOCA under Section 5 of the Fourteenth Amendment. Although FOCA prohibits states from enacting regulations that would otherwise be upheld under *Casey*'s "undue burden" standard, FOCA does not pose a separation-of-powers problem. In passing FOCA, Congress has reasonably concluded that the prohibited state regulations would result in impermissible gender discrimination, race discrimination, and restrictions on freedom of travel. Therefore, Congress is not defining for itself the meaning of the Fourteenth Amendment independent of the Court's decisions; instead, it is passing a prophylactic law aimed at prohibiting judicially determined Fourteenth Amendment violations.

Seen in this light, FOCA is palatable with respect to both the individual's rights and states' rights. It expands a woman's right to choose whether or not to have an abortion, but does not do so at the cost of setting a precedent whereby Congress could just as easily restrict that right on a national scale. Although passing FOCA under Section 5 of the Fourteenth Amendment intrudes upon state autonomy, it does so only to the extent that the states have explicitly surrendered their autonomy to the very important and narrowly defined goals of the Fourteenth Amendment.

As an exercise of Congress's commerce power, however, FOCA could not withstand constitutional challenge. Congress could rationally conclude that disparate state regulations would affect interstate commerce, thereby bringing FOCA within the normal ambit of Congress's commerce power. However, principles of federalism inherent in the Tenth Amendment prohibit a regulation that so drastically encroaches upon state sovereignty for the sake of such a marginal federal commerce interest. The commercial impacts of these state regulations are completely overshadowed by their profound effects on the health and welfare of women—concerns with which the states are at least as equally qualified as the federal government to deal. To rest this social legislation upon the commerce power is, therefore, an affront to the autonomy of the states. To the extent *Garcia v. San Antonio Metropolitan Transit Authority* would hold the contrary, it must be overruled.

129. For another analysis of the constitutionality of FOCA, see Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 37-46 (1993).

Appendix: The Freedom of Choice Act of 1993

SECTION 1. SHORT TITLE.

This Act may be cited as the "Freedom of Choice Act of 1993."

SECTION 2. CONGRESSIONAL STATEMENT OF FINDINGS AND PURPOSE.

(a) FINDINGS. — Congress finds the following:

(1) The 1973 Supreme Court decision in Roe v. Wade established constitutionally based limits on the power of States to restrict the right of a woman to choose to terminate a pregnancy. Under the strict scrutiny standard enunciated in Roe v. Wade, States were required to demonstrate that laws restricting the right of a woman to choose to terminate a pregnancy were the least restrictive means available to achieve a compelling State interest. Since 1989, the Supreme Court has no longer applied the strict scrutiny standard in reviewing challenges to the constitutionality of State laws restricting such rights.

(2) As a result of the Supreme Court's recent modification of the strict scrutiny standard enunciated in Roe v. Wade, certain States have restricted the right of women to choose to terminate a pregnancy or to utilize some forms of contraception, and these restrictions operate cumulatively to—

(A)(i) increase the number of illegal or medically less safe abortions, often resulting in physical impairment, loss of reproductive capacity or death to the women involved;

(ii) burden interstate commerce by forcing women to travel from States in which legal barriers render contraception or abortion unavailable or unsafe to other States or foreign nations;

(iii) interfere with freedom of travel between and among the various States;

(iv) burden the medical and economic resources of States that continue to provide women with access to safe and legal abortion; and

(v) interfere with the ability of medical professionals to provide health services;

(B) obstruct access to and use of contraceptives and other medical techniques that are part of interstate and international commerce;

(C) discriminate between women who are able to afford interstate and international travel and women who are not, a

disproportionate number of whom belong to racial or ethnic minorities; and

(D) infringe upon women's ability to exercise full enjoyment of rights secured to them by Federal and State law, both statutory and constitutional.

(3) Although Congress may not by legislation create constitutional rights, it may, where authorized by its enumerated powers and not prohibited by a constitutional provision, enact legislation to create and secure statutory rights in areas of legitimate national concern.

(4) Congress has the affirmative power both under section 8 of Article I of the Constitution of the United States and under section 5 of the Fourteenth Amendment of the Constitution to enact legislation to prohibit State interference with interstate commerce, liberty or equal protection of the laws.

(b) PURPOSE. — It is the purpose of this Act to establish, as a statutory matter, limitations upon the power of States to restrict the freedom of a woman to terminate a pregnancy in order to achieve the same limitations as provided, as a constitutional matter, under the strict scrutiny standard of review enunciated in Roe v. Wade and applied in subsequent cases from 1973 to 1988.

SECTION 3. FREEDOM TO CHOOSE.

(a) IN GENERAL. — A State —

(1) may not restrict the freedom of a woman to choose whether or not to terminate a pregnancy before fetal viability;

(2) may restrict the freedom of a woman to choose whether or not to terminate a pregnancy after fetal viability unless such a termination is necessary to preserve the life or health of the woman; and

(3) may impose requirements on the performance of abortion procedures if such requirements are medically necessary to protect the health of women undergoing such procedures.

(b) RULES OF CONSTRUCTION. — Nothing in this Act shall be construed to —

(1) prevent a State from protecting unwilling individuals or private health care institutions from having to participate in the performance of abortions to which they are conscientiously opposed;

(2) prevent a State from declining to pay for the performance of abortions; or

(3) prevent a State from requiring a minor to involve a parent, guardian, or other responsible adult before terminating a pregnancy.

SECTION 4. DEFINITION OF STATE.

As used in this Act, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each other territory or possession of the United States.